

USA vs O'Connor and Sacco

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1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA,

5 -versus-

08-CR-77

6 LINDA O'CONNOR and DEAN SACCO.

7 -----
8 TRANSCRIPT OF PROCEEDINGS

9 held in and for the United States District Court,
10 Northern District of New York, at the Federal Building and
11 Courthouse, 15 Henry Street, Binghamton, New York, on
12 FRIDAY, April 25, 2008, before the HON. THOMAS J. McAVOY,
13 Senior United States District Court Judge, PRESIDING.

14 APPEARANCES:

15 FOR THE GOVERNMENT:

16 UNITED STATES ATTORNEY'S OFFICE

17 BY: MIROSLAV LOVRIC, AUSA

18 Binghamton, New York

19 FOR THE DEFENDANT O'CONNOR:

20 FEDERAL PUBLIC DEFENDER'S OFFICE

21 BY: LISA PEEBLES, AFPD

22 Syracuse, New York

23 FOR THE DEFENDANT SACCO:

24 KELLY FISCHER, ESQ.

25 Binghamton, New York

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1 THE COURT: This is in the matter of the
2 application of defense counsel of Kelly Fischer to withdraw
3 from the case defending defendant Mr. Sacco. Mr. Fischer is
4 here, state your appearance, please.

5 MR. FISCHER: Your Honor, Kelly Fischer for
6 defendant Sacco.

7 THE COURT: Mr. Sacco is also here. Good
8 morning, Mr. Sacco.

9 DEFENDANT SACCO: Good morning.

10 THE COURT: And I think we have Mr. Lovric
11 here from the government.

12 MR. LOVRIC: Morning, Judge.

13 THE COURT: The Court has received an
14 application from Mr. Fischer, which the Court is going to
15 order sealed, and is also going to order appended to the
16 record. Responses have come from the public defender. I
17 guess you should note your appearance too, Lisa.

18 MISS PEEBLES: Lisa Peebles on behalf of Linda
19 O'Connor.

20 THE COURT: CO-defendant. And the Court has
21 received correspondence from Miss Peebles on behalf of Miss
22 O'Connor taking no position on behalf of Miss O'Connor on the
23 application and the government has responded to the
24 application asking that it be denied.

25 Mr. Sacco, from your perspective, how have you

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1 been getting along with Mr. Fischer?

2 DEFENDANT SACCO: Well, I found Mr. Fischer to
3 be sincere, genuine, intelligent, articulate. Almost
4 Ivy-league type of attorney. However, I've been disappointed
5 that our communication has not been continual in the last
6 eight weeks.

7 THE COURT: Okay. Mr. Fischer, what would you
8 like to say without going into any details regarding the
9 application you've made about the situation this morning?

10 MR. FISCHER: Basically, your Honor, I would
11 cite the ethical consideration under the Professional Code of
12 Professional Responsibility EC2-30 which basically says that
13 if the intensity of an attorney's personal feelings might
14 affect -- may affect that attorney's ability to effectively
15 represent his client, then the attorney should seek to
16 withdraw. Based on the paperwork that I submitted which
17 basically sets out my position personally, that raises a real
18 concern for me in this case.

19 THE COURT: All right.

20 MR. FISCHER: Particularly with respect to the
21 primary witness, almost the exclusive witness against
22 Mr. Sacco, Shannon O'Connor.

23 THE COURT: I don't know about the exclusivity
24 but I think you're right about the primacy.

25 Mr. Lovric, did you wish to be heard on this?

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1 He cites to the canon of ethics that he says mandates under
2 ethical considerations the ability to withdraw when a
3 person -- an attorney's personal considerations would make it
4 difficult for him to defend his client in this case, or
5 impossible.

6 MR. LOVRIC: Judge, I don't think I'm in any
7 position to offer any useful analysis of that not knowing the
8 factual basis as to what exactly is the request here.

9 THE COURT: Let me just say, without going
10 into any great detail, that Mr. Fischer has expressed to me a
11 sincere problem that he has about continuing in this and it
12 has nothing to do with logistics. It has to do with his own
13 personal convictions and the Court believes that what he said
14 was totally sincere and the Court accepts that. The Court
15 has doubts, however, as to whether or not that's an
16 appropriate legal consideration for granting that relief.
17 The Court has done considerable research on that issue, has
18 not researched the canon that just was brought up by
19 Mr. Fischer, but will do so shortly and will issue a brief
20 decision. But I just wondered -- I know the government has
21 considerations. You're ready for trial. You've got your
22 witnesses. I take it they're coming from all over. It's the
23 eleventh hour for this application. The Court notes,
24 Mr. Fischer, that you've been representing Mr. Sacco for some
25 weeks now. Nothing really has changed in the charges against

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1 Mr. Sacco. There may have been some slight change in the
2 quantum or quality of proof against him and the Court doesn't
3 believe that that warrants this kind of a consideration.
4 Looking at the whole picture, nothing as the Court iterated
5 is really different about the nature and circumstances of the
6 charge against Mr. Sacco. You have indicated to me, and I've
7 accepted that, you have carefully reviewed all of the
8 discovery that the government has provided to you, that you
9 spent a great deal of time reviewing that discovery because
10 it was voluminous and you have a good knowledge of what's
11 involved in this case and the Court accepts that to be true.

12 So, Miss Peebles, did you want to say anything
13 now?

14 MR. LOVRIC: Judge, could I just add something
15 to get my two cents on the record?

16 THE COURT: I thought you had your two cents.
17 Go ahead and put in three or four cents.

18 MR. LOVRIC: Yeah, Judge. I guess to address
19 what I can address which is the government's ready to go to
20 trial. We're ready to go to trial on both defendants. You
21 know, without knowing all the other things I really can't
22 intelligently offer any opinion on it. What I can offer is,
23 and I do mean this in a very respectful way to Mr. Fischer
24 and to everyone involved, my primary concern is with my
25 victim. I have a 14-year-old girl that's ready to testify.

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1 We have been preparing her to testify now for the last month,
2 in addition to preparing all the other witnesses. In this
3 kind of a case versus -- if this was some RICO drug case or
4 something like that, I probably wouldn't really care if there
5 were some issues and we needed several more weeks to try the
6 case.

7 THE COURT: I'll make a note of that and
8 remember that for future reference.

9 MR. LOVRIC: Well, I think we have in the past
10 where things come up in the last minute and we do accommodate
11 issues but in this particular case it's very different. This
12 victim has waited a long time to testify and she is ready to
13 walk into this Court and testify about everything that
14 happened to her. So my primary concern is with we're ready
15 to go. She is ready to go and we would like to try this
16 case.

17 THE COURT: Well, the Court -- I'll hear from
18 you, Mr. Fischer, in just a moment. The Court is concerned,
19 of course, and must ensure that Mr. Sacco has adequate
20 counsel that can fairly represent him in an unconflicted
21 situation and that he'll get a good defense on trial.

22 Mr. Fischer.

23 MR. FISCHER: I'm glad Mr. Lovric raised what
24 he raised about the trial preparation involved. Given that
25 I'm still retained or still representing Mr. Sacco in this

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1 case, I need to raise at this point a problem that Mr. Sacco
2 has with the recent receipt in literally a box containing
3 about 50 pounds of documents, some information indicating
4 that there was a condom found in a storage shed that
5 apparently we have been told within the last about two weeks
6 that contains DNA from this young woman and also apparently
7 contains DNA from some unnamed male. The prosecutor has
8 requested that Mr. Sacco provide a DNA swab and having spoken
9 with Mr. Sacco, he's not willing to do that. But that also
10 now presents to Mr. Sacco the problem that he probably, not
11 probably, he must have that DNA that was just recently found
12 tested to see what it shows because it will be important to
13 his defense in this case to have that result privately tested
14 and that is going to take time. That also effects the
15 scheduling of the going forward with the trial on Monday. I
16 have sought out DNA experts but I have not found anybody who
17 can do this on such short notice now, and that presents a
18 scheduling difficulty that I raise to the Court at this point
19 on Mr. Sacco's behalf.

20 I also have to tell the Court that in speaking
21 with Mr. Sacco yesterday, Mr. Sacco, and we discussed the
22 possibility some time ago and we never revisited the issue,
23 expressed a consideration in reconsideration of trying this
24 case non-jury. Given the volume of the evidence that's now
25 accumulated against him that I'm aware of, it may be in his

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1 best interest to try this in front of the Court rather than
2 in front of a jury. And I raise that because --

3 THE COURT: Well, we've got two separate
4 concerns here.

5 Miss Peebles.

6 MISS PEEBLES: We're not willing to waive our
7 right to a trial by jury for obvious reasons. And if, in
8 fact, Mr. Fischer feels that way about representing
9 Mr. Sacco, in light of the Court's decision with regard to my
10 application for severance, I have very serious concerns that
11 if he cannot effectively represent Mr. Sacco, it will
12 definitely spill over into my case with regard to Miss
13 O'Connor. So I would ask the Court to grant Mr. Fischer's
14 application based on that ground on behalf of my client.

15 Judge, we have been preparing for trial. I've
16 been working 24/7. I cancelled a trip to South Carolina and
17 I've subpoenaed my witnesses, but this case is important to
18 my client because it will effect the rest of her life
19 obviously and I think every precaution has to be made in
20 order to ensure that both defendants receive a fair trial.

21 Our position would be at this point, knowing
22 what I know now, that I would ask the Court to grant
23 Mr. Fischer's request to be relieved as Mr. Sacco's attorney
24 and get somebody on board that will, in fact, be able to
25 effectively represent him.

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1 THE COURT: Don't you have cross purposes
2 there? You've done all this work, ready to go to trial now,
3 you want me to delay the trial by granting Mr. Fischer's
4 application?

5 MISS PEEBLES: Well, your Honor, I do have
6 cross purposes but my primary purpose is to make sure Miss
7 O'Connor has a fair trial and I didn't know that that was
8 Mr. Fischer's reason when the Court asked us to respond to
9 his original application. If he is telling the Court that he
10 is conflicted and he cannot effectively represent Mr. Sacco
11 and the key witness is testifying against both defendants in
12 this case, I have a real concern that something he may or may
13 not be able to do or does will, in fact, have a detrimental
14 impact on Miss O'Connor. I think it's only fair for both
15 defendants that they have attorneys that can be zealous
16 advocates on their behalf and I think that's what the law
17 requires, your Honor. It doesn't appear Mr. Fischer's going
18 to be able to do that.

19 THE COURT: I disagree with you. I don't
20 think the law requires zealousness on part of the attorney.
21 I think it requires adequacy on part of the attorney. I know
22 Mr. Fischer is more than adequate.

23 MISS PEEBLES: I don't disagree with that,
24 your Honor. I have a concern based on what I just heard in
25 the courtroom.

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1 THE COURT: I appreciate your concern.

2 Mr. Lovric, what do you say in response to
3 Mr. Fischer's claim that he only recently received the
4 evidence concerning the DNA and that he is not, even though
5 he's tried, had time to secure an expert that will be able to
6 analyze, on Mr. Sacco's behalf, whether or not that DNA is,
7 in fact, from the victim or who it is from. What do you say
8 about that?

9 MR. LOVRIC: Judge, what I say is, we're
10 learning of this one day before trial. We have given the
11 defense notice of things that we have found and things that
12 we have recovered as we recovered them. Back when the search
13 warrant of that storage unit was done, which was a search
14 warrant done recently.

15 THE COURT: Give me a date.

16 MR. LOVRIC: I'd have to look, Judge. I
17 believe it was in March sometime that that storage unit was
18 searched.

19 THE COURT: March of 2008?

20 MR. LOVRIC: Yes.

21 THE COURT: First part of March, middle March,
22 end of March?

23 MR. FISCHER: March 31, your Honor.

24 THE COURT: March 31.

25 MR. LOVRIC: No, no, that's not correct.

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1 March 31 is when I sent to both counsel the results of the
2 condom test that I got back from the DNA lab.

3 THE COURT: When did you get that back?

4 MR. LOVRIC: I got it faxed to me I believe
5 two days -- one day before then. It was faxed to me by the
6 lab, I sent it out to defense.

7 THE COURT: March 29 or 30?

8 MR. LOVRIC: I believe so.

9 THE COURT: Okay.

10 MR. LOVRIC: The search warrant of that
11 storage unit was done in March and we didn't know about that
12 storage unit. We came upon it when we found a witness, a
13 person that was a handyman for the defendant, and that
14 handyman informed the police that there was a storage unit,
15 and I do want to get this on the record because this is
16 relevant. We disclosed to the defense when that search
17 warrant was done. I think in a couple days I sent out copies
18 of the search warrant, affidavit and the inventory and on
19 that inventory it indicated packaged condoms and a used -- it
20 didn't say used but it said a condom found in the storage
21 unit. Mr. Sacco's investigators in the state case had found
22 this same witness, this handyman, when Mr. Sacco was
23 preparing to go to trial on the state because this witness
24 has told us that an investigator from the state defense
25 counsel came to see him and this witness said that he told

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1 this investigator that there was a storage unit that he had
2 rented from Mr. Sacco and put all of Mr. Sacco's belongings
3 of the house into. His dresser, his materials, all the
4 things that he had gathered. This witness asked the
5 investigator did he want the key to the storage unit? And
6 the investigator said no, I don't want that key and I don't
7 want to look what's inside that storage unit.

8 THE COURT: When did that occur?

9 MR. LOVRIC: That occurred prior to -- I know
10 it occurred prior to February of this year. I would have to
11 go back. I believe it was some time in the fall of 2007.
12 So, Mr. Sacco knew about this storage unit and Mr. Sacco's
13 defense counsel in the state proceeding knew about this
14 storage unit well before law enforcement. We learned of it
15 when we interviewed this witness which was after the
16 indictment in this case was brought out. It's after
17 February 12 or 13 of 2008 when we indicted Mr. Sacco.
18 Shortly after we learned of this storage unit, a search
19 warrant was obtained. The unit was searched and in it was
20 found, among many things, a used condom. It was in
21 Mr. Sacco's dresser -- one of his drawers. That used condom
22 then was sent to the DNA lab in -- New York State Police lab
23 in Albany. The lab did an analysis and it found on the
24 outside of the condom a female DNA, a full -- full allele
25 spectrum DNA of a female. On the inside they found a

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1 mixture. The mixture was a male/female mixture and a
2 predominate allele with the female. We got that result back.
3 We gave it to the defense. We gave both defense counsel
4 copies of those reports. We then went out and got a buccal
5 swab from the victim. We then sent that buccal swab to the
6 DNA lab. The DNA lab analyzed the victim's DNA compared to
7 the DNA found on the condom. The outside condom matches
8 perfectly the victim's DNA. There's a one in three
9 hundred billion chance it's someone other than the victim.
10 The inside mixture, male to female, the female portions of
11 the DNA are consistent with the victims. The male portion of
12 the DNA -- there is only three alleles present and the only
13 thing that any lab could say is whether a person is excluded
14 as a possible contributor. They could not make a match even
15 if you sent them the person who you believe is the person
16 that left that. We provided those results to the defense at
17 the same time that I got them. Within a day of getting them
18 I provided that result. The first result we gave them when
19 we received it from the lab.

20 Couple things, Judge. First, this is the
21 first I'm hearing from defense on Mr. Sacco's behalf that
22 they have something they need to do as far as testing. I had
23 even offered -- if Mr. Sacco wanted to submit a buccal swab,
24 we would have the lab run his buccal swab to that three
25 allele mixture portion to see if he could be excluded or not

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1 excluded. That's all they would be able to say. That would
2 take one or two days according to the lab. I never heard
3 anything back from the defense. In my letter, if I don't
4 hear back, I assume Mr. Sacco is not interested.

5 THE COURT: When did that letter go out?

6 MR. LOVRIC: Judge, I'd have to look.

7 THE COURT: Give me a couple of days.

8 MR. LOVRIC: What's today, 25? I don't know.
9 Maybe ten days ago. I don't know if Mr. Fischer has the
10 letter with him. I don't. So, first of all, Judge, I'm a
11 little troubled that the defense tells me this here on
12 Friday. I mean, when we sent out all these results, I gave
13 them the Jencks material as to the -- I gave him the reports
14 as I got them. I never got any calls from anybody, except
15 Miss Peebles in kind of a joking way asking for something but
16 it was -- the defense never indicated anything that they
17 wanted any more time or anything more from us as far as this
18 DNA test is concerned. The point being though, this was done
19 as we were uncovering evidence. It's not as though we did or
20 found these things many, many months ago and the most
21 critical point that I point to is Mr. Sacco, the defendant,
22 knew about this storage unit and this condom in that storage
23 unit and his investigator on the state side and I have to
24 assume his lawyer on the state side knew that, as well. They
25 chose not to touch it and not to do anything with it. That's

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1 their prerogative. He certainly can't say that he is
2 surprised by things that we have uncovered in the last
3 several weeks. So that's my point as far as the DNA is
4 concerned.

5 The non-jury trial, again, I'm hearing all of
6 this right now Friday, day before trial. First of all, it's
7 very interesting. Second of all, I think it's completely --
8 should not effect what we're doing here. If Mr. Sacco wants
9 a jury trial, I will think about whether the government wants
10 to consent to a jury -- to a non-jury trial with Mr. Sacco as
11 I don't know if he knows it, but we have to agree to a
12 non-jury trial in the federal system. And if we do, in fact,
13 we can still have one trial starting Monday. The try will go
14 on. Your Honor will decide Mr. Sacco's fate, the jury will
15 decide Miss O'Connor and we go on with the trial. I don't
16 really think that's an issue. If the government decides that
17 we want a jury trial as to both, then that would take place
18 as to both but I am a little perplexed as to why we're
19 discussing this DNA issue today. I'm wondering whether it's
20 simply another argument that really goes to the first
21 application to be relieved and, again, not knowing what the
22 substance of that is I can't throw my two cents in whether I
23 think that's valid or not.

24 THE COURT: The Court can separate out the
25 application on the basis upon which it was made from the DNA

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1 problem that the Court now must wrestle with because just --
2 it would seem to me that ordinarily if there had been a lot
3 of time, Mr. Fischer certainly would have the opportunity to
4 submit that condom to a lab for independent analysis that
5 might be different than what your lab said.

6 MR. LOVRIC: Sure.

7 THE COURT: But I'm going to have to think
8 about it in relationship to how this came up as far as the
9 time is concerned.

10 MR. FISCHER: With respect to those times the
11 report is dated March 31 from the State Police lab. It came
12 in a box of discovery to me sometime thereafter and I don't
13 have the date. Mr. Lovric's letter to me is dated April 17
14 and was mailed over to me, so I received it sometime
15 thereafter.

16 THE COURT: Okay. That helps.

17 MR. LOVRIC: But I want to point out, though,
18 I don't want to get into a mini war with Mr. Fischer here.
19 In addition to this box of things, I do this little thing
20 called a discovery notice and in there very conspicuously is
21 please note the condom has been analyzed and it summarizes --
22 so this letter goes back in ECF, so I don't think I'm hearing
23 that Mr. Fischer is saying it took him 14 days to read the
24 whole box, only then did he realize there's a DNA report. In
25 my ECF notice letter which comes to him on his computer, like

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1 it does to me, I articulate in there, there has been a DNA
2 test done on a condom. The report is included in discovery
3 and when I got the results in my letter I indicate the
4 results of that DNA analysis and when I got the match I
5 indicate that in the letter. So I hope I'm not hearing from
6 counsel that he just -- it got lost in the shuffle of many,
7 many papers in a box because I don't believe that's accurate.

8 DEFENDANT SACCO: Your Honor, if I may say one
9 thing. I'm interested in going to trial as quickly as
10 possible as Miss Peebles is. I want to get it behind me but
11 I have no indication whatsoever that Mr. Fischer is actually
12 ready at this time. I haven't discussed anything. I haven't
13 seen any motions that he's put forth. I haven't received any
14 replies from any of the letters that I sent him in the last
15 eight weeks. When I read in the newspaper that a trial was
16 taking place on the 28 of April, I was -- it couldn't be
17 true. I hadn't spoken to Mr. Fischer so I think there is a
18 little bit of an issue that he may not be ready, although I'd
19 like to go, you know.

20 THE COURT: Okay. All right. The Court
21 understands. All right.

22 Well, the Court needs at least a few minutes
23 to think over these things it's been presented with for the
24 first time in this context today, this morning on this bench,
25 so I'll try to get an order out sometime this afternoon.

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1 Beyond that, I cannot do anything.

2 Court stands adjourned.

3 (Court stands adjourned)

4 C E R T I F I C A T I O N

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6
7 I, VICKY A. THELEMAN, RPR, CRR, United
8 States Court Reporter in and for the United States
9 District Court, Northern District of New York, do
10 hereby certify that I attended at the time and place
11 set forth in the heading hereof; that I did make a
12 stenographic record of the proceedings had in this
13 matter and cause the same to be transcribed; that
14 the foregoing is a true and correct copy of the same
15 and the whole thereof.

16
17
18
19 VICKY A. THELEMAN, RPR, CRR
20 United States Court Reporter
21 US District Court - NDNY
22
23
24 Dated: April 28, 2008.
25